

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

No. CR S-99-0051 GEB EFB P

vs.

REVERIANO OLIVERA,

Movant.

FINDINGS AND RECOMMENDATIONS

Movant is a federal prisoner proceeding pro se with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.¹ He seeks post-conviction relief on the grounds that: (1) his trial counsel rendered ineffective assistance; and (2) his Fourth and Fifth Amendment rights were violated during the traffic stop which culminated in his arrest. Movant has also filed a motion to supplement his § 2255 motion to add an additional claim of ineffective assistance of trial and appellate counsel. Upon careful consideration of the record and the applicable law, the court finds that both motions must be denied.

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¹ This motion was assigned, for statistical purposes, the following civil case number:
No. CIV S-04-0384 GEB EFB P.

1 **I. Background**

2 On February 11, 1999, the grand jury returned an indictment charging movant with
3 possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

4 On April 1, 1999, movant's attorneys J. Tony Serra, James Bustamante, and Alexandra Clay
5 filed a motion to suppress statements and a motion to suppress evidence obtained as a result of a
6 traffic stop conducted on January 13, 1999, along with a request for an evidentiary hearing on
7 those motions. Answer, Exs. 1, 2. Neither motion was supported by a factual declaration from
8 movant describing movant's version of the events. *Id.* However, the motions were supported by
9 a declaration from counsel, which stated, in full: "It is my information and belief that the facts
10 and statements set forth in the accompanying document are true and correct to the best of my
11 knowledge and belief." *Id.*

12 On April 15, 1999, the government filed an opposition to both motions contending that
13 the factual allegations contained in the motions to suppress were "unsupported" and had no basis
14 in the record. Answer, Ex. 3 at 14, 17, 20. On April 22, 1999, movant filed a reply, Answer, Ex.
15 4, which included a declaration of counsel that listed the factual issues disputed by movant but
16 did not present movant's own version of the facts. Answer, Ex. 5. Also on April 22, 1999, a
17 superseding indictment was filed charging movant and several co-defendants with conspiracy to
18 manufacture and possess methamphetamine with the intent to distribute, 21 U.S.C. § 846, and
19 possession of methamphetamine with intent to distribute, 21 U.S.C. § 841(a)(1).

20 By order dated May 25, 1999, the district court denied movant's motions to suppress.
21 Answer, Ex. 6. The court also denied movant's request for an evidentiary hearing, finding that
22 counsel's declaration--which was not based on personal knowledge and therefore had little, if
23 any, probative value--was insufficient to warrant a hearing. Answer, Ex. 1 to Ex. 8, at 32-35.
24 On August 5, 1999, movant filed a motion to reconsider both motions to suppress and the request
25 for an evidentiary hearing. Answer, Ex. 7. The motion for reconsideration included a
26 declaration signed by movant, which set forth, in detail, his version of the events at the traffic

1 stop. *Id.* The district court denied movant's motion for reconsideration by order dated
2 September 3, 1999.

3 On June 9, 2000, following a jury trial, movant was found guilty on all counts. On
4 September 15, 2000, movant was sentenced to 240 months incarceration. Movant filed a timely
5 appeal of his conviction, and respondent filed a cross-appeal of movant's sentence. In an
6 unpublished disposition, the Ninth Circuit affirmed movant's conviction. *United States v.*
7 *Olivera*, 52 Fed.Appx. 364 (9th Cir. 2002). Movant's petition for rehearing was denied on
8 March 4, 2003.

9 The instant motion, seeking relief pursuant to 28 U.S.C. § 2255, was filed on February
10 24, 2004.

11 **II. Applicable Law**

12 **A. Motions pursuant to 28 U.S.C. § 2255**

13 Title 28 U.S.C. § 2255 provides, in part, as follows:

14 A prisoner in custody under sentence of a court established by Act
15 of Congress claiming the right to be released upon the ground that
16 the sentence was imposed in violation of the Constitution or laws
17 of the United States, or that the court was without jurisdiction to
18 impose such sentence, or that the sentence was in excess of the
maximum authorized by law, or is otherwise subject to collateral
attack, may move the court which imposed the sentence to vacate,
set aside or correct the sentence.

19 **B. Movant's Claim of Ineffective Assistance of Counsel**

20 To support a claim of ineffective assistance of counsel, a movant seeking relief under
21 § 2255 must first show that, considering all the circumstances, counsel's performance fell below
22 an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
23 To this end, movant must identify the acts or omissions that are alleged not to have been the
24 result of reasonable professional judgment. *Id.* at 690. The court must then determine whether,
25 in light of all the circumstances, the identified acts or omissions were outside the wide range of
26 professional competent assistance. *Id.* "There is a strong presumption that counsel's

performance falls within the ‘wide range of professional assistance.’” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (quoting *Strickland*, 466 U.S. at 689). There is in addition a strong presumption that counsel “exercised acceptable professional judgment in all significant decisions made.” *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) (citing *Strickland*, 466 U.S. at 689).

Second, movant must affirmatively prove prejudice. *Strickland*, 466 U.S. at 693. Prejudice is found where “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* The *Strickland* standards apply to appellate counsel as well as trial counsel. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Miller v. Keeney*, 882 F.2d 1428, 1433 (9th Cir. 1989).

III. Movant’s Claims

A. Ineffective Assistance of Trial Counsel

Movant claims that his trial counsel rendered ineffective assistance by: (1) failing to include movant’s factual declaration in support of the April 1, 1999 motions to suppress and request for evidentiary hearing; and (2) failing to “bring out the fact” that during the January 13, 1999 traffic stop, the Highway Patrol Officer pulled movant over because he was following a semi truck too closely and occasionally took movant’s pulse without his consent. § 2255 motion at 2. Movant’s claim is stated, in full, as follows:

My attorney failed to properly file include [sic] a factual declaration signed by and attached to my motion to suppress, as required. My own attorney recognized his failure to include this declaration and his opinion was that he had committed ineffective assistance of counsel. My attorney has filed an affidavit in this regard previously with the court. Furthermore, my attorney failed to bring out the fact that when I was stopped by an officer from the California Highway Patrol, after a prolonged stop, he would occasionally take my pulse to see whether I was exhibiting a sign of nervousness. This was being done by Officer Robert Paskwietz, without my consent. The pretext for my stop was that I was following a semi truck too closely. My attorney failed to bring out these facts to the attention of the court. I believe that these facts would have made a difference in my case.

1 *Id.* Movant has not submitted the affidavit, if any, allegedly signed by his attorney and filed with
2 the court, in which counsel conceded that his failure to include movant's declaration in support
3 of the motions to suppress constituted ineffective assistance of counsel.

4 **1. Factual Background**

5 On January 13, 1999, a vehicle driven by movant was stopped by Officer Jerry Wayne
6 Smith. Reporter's Transcript on Appeal (RT) at 973-82. At movant's trial, Officer Smith
7 described the events that transpired during the stop, as follows. Officer Smith was on patrol on
8 Interstate 5 in Yolo County when he observed movant driving a pickup truck with a broken
9 taillight. *Id.* at 973-74, 982. He activated his lights and movant pulled over. *Id.* at 975. Movant
10 gave Officer Smith a license plate containing the name William Eugene Perez, and other
11 documents indicating that the truck was registered to Jose Angel Ayala. *Id.* at 976-78.
12 According to Officer Smith, movant's hands were trembling and he wouldn't make eye contact
13 with Officer Smith. *Id.* at 978. Movant appeared to understand Officer Smith, but he did not
14 appear to be a native English speaker. *Id.* Officer Smith asked movant to come out of the car,
15 and he showed movant the broken taillight. *Id.* at 979. Smith gave movant a verbal warning,
16 returned his documents to him, and told him he would not give him a citation. *Id.* As movant
17 was walking back to the car, Officer Smith asked for permission to search the vehicle and
18 movant consented. *Id.* at 980. Officer Smith released his dog from the police car, and the dog
19 alerted on the spare tire of movant's truck. *Id.* at 980-81. Officer Smith took off the tire and
20 discovered packages that were later determined to contain methamphetamine and
21 pseudoephedrine. *Id.* at 981-83, 1071-72.

22 **2. Analysis**

23 As described above, movant's April 1, 1999 motions to suppress, which made various
24 factual allegations related to the January 13, 1999 vehicle stop, was supported by a factual
25 declaration signed by movant's attorneys but was not supported by a factual declaration signed
26 by movant himself. Movant contends that his trial counsel's failure to include movant's own

1 declaration constituted ineffective assistance of counsel. Assuming it did, movant must also
 2 show he was prejudiced by this failure. To demonstrate prejudice, movant must show, at a
 3 minimum, that the trial court would have granted his request for an evidentiary hearing had his
 4 declaration been included in the motions to suppress, and that his suppression motions would
 5 have been granted after the hearing took place. *Van Tran v. Lindsey*, 212 F.3d 1143, 1156 (9th
 6 Cir. 2000), *overruled on other grounds* by *Lockyer v. Andrade*, 538 U.S. 63 (2003) (citing
 7 *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (“in order to show prejudice when a
 8 suppression issue provides the basis for an ineffectiveness claim, the petitioner must show that
 9 he would have prevailed on the suppression motion, and that there is a reasonable probability
 10 that the successful motion would have affected the outcome”)). *See also Bailey v. Newland*, 263
 11 F.3d 1022, 1029 (9th Cir. 2001) (same). Movant has not made the required showing.

12 Local Rule 430.1(i) provides that:

13 Whenever any motion has been granted or denied in whole or in
 14 part, and a subsequent motion for reconsideration is made upon the
 15 same or any alleged different set of facts . . . it shall be the duty of
 16 counsel to present to the Judge or Magistrate Judge to whom such
 subsequent motion is made an affidavit or brief, as appropriate,
 setting forth the material facts and circumstances surrounding each
 motion for which reconsideration is sought, including:

17 (1) when and to what Judge or Magistrate Judge the prior motion
 18 was made;

19 (2) what ruling, decision or order was made thereon; and

20 (3) what new or different facts or circumstances are claimed to
 21 exist which did not exist or were not shown upon such prior
 motion or what other grounds exist for the motion.

22 As set forth above, movant filed a request for reconsideration of his motions to suppress, arguing
 23 that an evidentiary hearing was warranted in light of the facts set forth in movant’s factual
 24 declaration. Answer, Ex. 7. He also asked the trial court to reconsider its prior rulings on the
 25 merits of the motions to suppress in light of the “new facts” set forth in movant’s declaration. *Id.*
 26 at 6, 13-19.

1 Movant's counsel complied with Local Rule 430.1(i) by including in the motion for
2 reconsideration movant's affidavit, which set forth new or different facts or circumstances which
3 were not shown upon the prior suppression motions. Local Rule 430.1(i), on its face, does not
4 impose any additional burden upon a party seeking reconsideration.

5 Movant's motion for reconsideration, which was supported by his own declaration stating
6 his version of the facts, was denied. The trial court declined to hold an evidentiary hearing,
7 notwithstanding the factual allegations set forth in movant's declaration. Under these
8 circumstances, movant cannot demonstrate that he would have received an evidentiary hearing
9 or a favorable ruling on his motions to suppress if he had included his declaration at the time the
10 motions were originally filed. Given that the motions to suppress and request for evidentiary
11 hearing were denied by the trial judge even when supported by movant's factual declaration,
12 there was no prejudice from the failure to include movant's declaration with the original
13 motions. Accordingly, the court need not consider whether counsel's earlier failure constituted
14 deficient performance.

15 Movant also alleges that his trial counsel "failed to bring out the fact" that when he was
16 stopped by Officer Robert Paskwietz, "after a prolonged stop, he would occasionally take my
17 pulse to see whether I was exhibiting a sign of nervousness." § 2255 Motion, at 2. Movant
18 further contends that counsel was ineffective in failing to inform the court that "the pretext for
19 my stop was that I was following a semi truck too closely." *Id.* These allegations are not
20 supported by the record before this court.

21 Officer Paskwietz was not involved in the traffic stop of movant's vehicle that took place
22 on January 13, 1999. Answer at 20, n.11. Rather, on September 25, 1997, Officer Paskwietz
23 stopped a truck registered in movant's name but driven by Salvador Flores-Lopez. *See* RT at 66-
24 70. Although the events that transpired on September 25, 1997 were relevant to the criminal
25 case against movant, movant was not present at that traffic stop. *See* Answer, at 4. Further, the
26 reason for the stop on September 25, 1997 was that the driver of the vehicle was following a

1 semi truck too closely. *Id.* at 68. Officer Smith stopped movant's vehicle on January 13, 1999
 2 because his taillight was missing. Accordingly, movant's identification of Officer Paskwietz as
 3 the person who stopped his vehicle on January 13, 1999 appears to be incorrect, as is his
 4 assertion that he was stopped because he was following a semi truck too closely. Further,
 5 movant has not directed the court to any evidence in the record that Officer Paskwietz, or anyone
 6 else, took his pulse during a traffic stop. Because the factual allegations supporting these claims
 7 of ineffective assistance of counsel appear to be incorrect or mistaken, and are not supported by
 8 the record, movant has failed to demonstrate prejudice resulting from his trial counsel's failure to
 9 bring these "facts" to the attention of the trial court. Accordingly, movant's claims in this regard
 10 must be denied.

11 **B. Fourth Amendment**

12 Movant's second claim is stated, in full, as follows:

13 The government states that I was stopped by Officer Robert
 14 Paskwietz of the California Highway Patrol because I was
 15 following to [sic] closely to a semi truck. I was told by Officer
 16 Paskwietz that I was being stopped because my license plate light
 17 was not functioning. It is now obvious that my stop was a pretext
 18 for a search. During this stop which lasted more than two hours, I
 was forced to answer questions posed by him and my pulse was
 taken occasionally by him. I assume that he was doing this to see
 if I was nervous during his interrogation and search of my [sic]
 pickup truck. These actions by him have not been fully addressed
 by my attorney or the Court.

19 § 2255 Motion at 2-3. Movant contends that this situation violated his "constitutional rights
 20 under the Fourth Amendment guaranteeing me to be secure from unreasonable searches and
 21 seizures." *Id.* at 2.

22 As explained above, movant appears to be confusing the traffic stop of his vehicle by
 23 Officer Smith on January 13, 1999 with a traffic stop on September 25, 1997 conducted by
 24 Officer Paskwietz involving a different vehicle driven by Salvador Flores-Lopez. There is no
 25 evidence movant's pulse was taken or that he was stopped because he was following another
 26 vehicle too closely. To the extent movant is alleging his trial counsel rendered ineffective

1 assistance in failing to bring these facts to the attention of the court, he has failed to demonstrate
 2 prejudice. To the extent he is alleging his Fourth Amendment rights were violated by a search
 3 conducted by Officer Paskwietz, including the taking of movant's pulse during that search, his
 4 claim lacks a factual basis and must be denied. If movant is challenging the trial court's ruling
 5 on his motions to suppress the statements and evidence obtained as a result of the traffic stop on
 6 January 13, 1999, he has failed to demonstrate that the trial court's denial of those motions was
 7 in error.

8 For all of these reasons, movant is not entitled to relief on this claim.

9 **C. Fifth Amendment**

10 Movant claims that his Fifth Amendment right against self-incrimination was violated for
 11 the following reasons:

12 During the stop of my vehicle, I was repeatedly asked questions by
 13 the Officer who stopped me, Robert Paskwietz of the California
 14 Highway Patrol. During his interrogation, he kept taking my pulse
 15 to see if I was nervous. I was the focus of an investigation and
 16 therefore, my constitutional rights had attached. Yet, he continued
 with his interrogation and questioning of me. I was being
 compelled by him to answer all of this questions because he
 assured me that I could leave if I cooperated with him.

17 § 2255 Motion at 3. For the reasons described above, movant's claim in this regard appears to
 18 lack a factual basis. In addition, movant's claims are vague and conclusory and should be denied
 19 on that ground as well. *See Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) (“[c]onclusory
 20 allegations which are not supported by a statement of specific facts do not warrant habeas
 21 relief”) (quoting *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994)).

22 **IV. Motion to Supplement**

23 On January 5, 2007, movant filed a motion pursuant to Fed. R. Civ. P. 15(d) to
 24 supplement his § 2255 motion to add the additional claims that his trial counsel rendered
 25 ineffective assistance in failing to adequately advise him “about the benefits and consequences
 26 of going to trial versus pleading guilty,” and that his appellate counsel was ineffective in failing

1 to raise this issue on appeal. January 5, 2007 Mot. to Suppl., at 2. Movant argues that if he had
2 been “properly advised” by his trial counsel, he would have pled guilty. He further argues that
3 he would have received a lesser sentence after a guilty plea because he would have avoided a
4 two level sentencing enhancement that was apparently added to his sentence after the trial judge
5 found that a portion of his trial testimony constituted obstruction of justice, and would have
6 received downward sentencing departures pursuant to the “safety valve” provision contained in
7 § 5C1.2 of the United States Sentencing Guidelines,² and for acceptance of responsibility. *Id.* at
8 3.

9 Fed. R. Civ. P. 15(d) provides:

10 On motion and reasonable notice, the court may, on just terms,
11 permit a party to serve a supplemental pleading setting out any
12 transaction, occurrence, or event that happened after the date of the
13 pleading to be supplemented. The court may permit
supplementation even though the original pleading is defective in
stating a claim or defense. The court may order that the opposing
party plead to the supplemental pleading within a specified time.

14 The event that movant describes in his motion to supplement – the failure of his trial counsel to
15 adequately advise him of the benefits of pleading guilty – did not happen after the date of
16 movant’s § 2255 motion. Accordingly, it appears that movant may not supplement his motion to
17 add his new claim of ineffective assistance of counsel pursuant to Fed. R. Civ. P. 15(d).

18 Assuming *arguendo* that movant is entitled to supplementation pursuant to Rule 15(d),
19 his claim lacks merit. There is no evidence that movant would have received a lesser sentence if
20 he had pled guilty, notwithstanding his speculative claim that he would have been entitled to
21 several downward sentencing departures. Further, movant’s late and unverified allegation that
22 he would have pled guilty if he had been “properly advised” does not provide sufficient evidence
23 that his trial counsel failed to advise him of the consequences of proceeding to trial or that he

24 ² Section 5C1.2 of the United States Sentencing Guidelines provides for a sentencing
25 reduction if the court finds the defendant meets certain criteria related to the circumstances of the
26 crime, the defendant’s criminal history, and the level of the defendant’s cooperation with the
government.

1 would have pled guilty under the circumstances of this case. Nor has movant demonstrated that
2 his appellate counsel rendered ineffective assistance in failing to raise this issue on appeal.
3 Movant's appellate counsel had no obligation to raise meritless issues on appeal. *Strickland*, 466
4 U.S. at 687-88. Accordingly, movant is not entitled to relief on his supplemental claims.

5 **V. Conclusion**

6 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 7 1. Movant's February 25, 2004 motion to vacate, set aside, or correct his sentence
8 pursuant to 28 U.S.C. § 2255 be denied;
9 2. The Clerk of the Court be directed to close the companion civil case No. CIV S-04-
10 384 GEB EFB; and
11 3. Movant's February 5, 2007 motion to supplement be denied.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
17 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
18 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: September 8, 2010.

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21 
22 EDMUND F. BRENNAN
23 UNITED STATES MAGISTRATE JUDGE
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